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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

SOUTHWESTERN BELL TELEPHONE COMPANY, a Corporation, Appellant, v. CARRIE C. LEE, Appellee.	}	No. 299.
and		
SOUTHWESTERN BELL TELEPHONE COMPANY, a Corporation, Appellant, v. S. B. HANNA, Appellee.	}	No. 300.

APPELLANT'S MOTION FOR REHEARING AND RECONSIDERATION OF ORDER DISMISSING APPEALS.

Now comes the appellant, Southwestern Bell Telephone Company (leave hereunto having first been obtained), and moves the Court to set aside its order of October 14, 1940, dismissing the appeals in these causes, and further moves the Court to rehear and reconsider the question of jurisdiction herein, for the reason that the Court erred in conclud-

ing that these causes are wanting in the timely presentation of federal questions, as will be made to appear in the accompanying suggestions in support hereof.

And the appellant further moves the Court to stay and withhold the mandates herein until such time as this motion may be disposed of, and thereafter as the circumstances may warrant.

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SUGGESTIONS IN SUPPORT OF MOTION.

The appellant can understand the Court's *per curiam* order of dismissal in these causes as meaning only that the federal questions were raised too late. The authorities pointed to as the basis for the order all declare that the raising of the federal questions on a petition for rehearing in the state court of last resort comes too late. The Court's use of the local citations within the cases directs attention exclusively to this principle; and this principle is the only one pronounced in any of the cited cases which the appellant can conceive as applicable to these causes.

As demonstrated in its brief in support of this Court's jurisdiction, the appellant has been well aware of the rule that ordinarily federal questions may not be first raised on a petition for rehearing. This law is well established, and is well supported by the authorities which this Court has employed, Godchaux v. Estopinal, 251 U. S. 179; Rooker v. Fidelity Trust Co., 261 U. S. 114, 117; Herndon v. Georgia, 295 U. S. 441, 443. But there is a well defined, and quite necessary, exception which is observed, in fact, on page 444 of the Herndon case—the page immediately following the one cited locally by this Court for a statement of the general rule. This Court said on page 444:

> "• • • There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. Saunders v. Shaw, 244 U. S. 317, 320, 61 L. ed. 1163, 1165, 37 S. Ct. 638; Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U. S. 74, 79, 74 L. ed. 710, 715, 50 S. Ct. 228, 66 A. L. R. 1460; Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U. S. 313, 320, 74 L. ed. 870, 875, 50 S. Ct. 326; Brinkerhoff-Faris Trust & Sav. Co. v. Hill,

281 U. S. 673, 677, 678, 74 L. ed. 1107, 1111, 1112, 50 S. Ct. 451; American Surety Co. v. Baldwin, 287 U. S. 156, 164, 77 L. ed. 231, 236, 53 S. Ct. 98, 86 A. L. R. 298; Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U. S. 358, 367, 77 L. ed. 360, 367, 53 S. Ct. 145, 85 A. L. R. 254."

Until the time of this Court's order of dismissal, the appellant had been confident that its cases clearly fell within the exception of uncontemplated actions by the state court of last resort. Owing, perhaps, to a little too much confidence on this score, the appellant relegated its rather brief treatment of this subject to the later pages of its brief respecting jurisdiction, where its discussion may be found beginning on page 25. The appellant there made no effort to repeat the facts earlier displayed in that brief, and to relate them to the subject of the seasonable tender of the federal issues. The appellant had assumed, perhaps mistakenly, that the acts of the Supreme Court of Arkansas which were described in the preceding pages of the brief would still be borne in mind and applied to the subject of the timely raising of the federal questions. Suspecting now that its assumption may have been unwarranted, the appellant will here undertake its demonstration that these cases are truly embraced in the exception to the rule.

The federal questions in these cases, while first raised on petition for rehearing, were nevertheless raised at the first opportunity. There were no federal questions in the cases until the surprising and unprecedented decision of the Supreme Court of Arkansas. While a fuller account may be found in the appellant's brief in support of jurisdiction, this, briefly, is what happened:

One of the appellant's tariff rules which had been duly filed with the Arkansas utilities' regulatory commission, as the Arkansas regulatory act required, and which had been

affirmatively approved and ordered enforced by the commission after hearing, was interposed by the appellant as a defense to the plaintiffs' actions under an Arkansas statute for penalties for refusal to provide telephone service. The penalty statute required an offer to comply with the reasonable rules and regulations of the telephone company. The plaintiffs categorically declined to comply with this particular rule (Tr. II, 5; Appellant's Brief on Jurisdiction, 22), and asserted that they were not obliged to do so in order to maintain their actions since other telephone customers were not complying with the rule.

In the trial court the plaintiffs never claimed that the rule was unreasonable, and accordingly they never offered any evidence on the subject of its reasonableness. Naturally, of course, with the reasonableness of the rule so conceded, the appellant, when its turn came, offered no evidence to fortify the concession. Furthermore, the appellant was conducting its cases in the belief that the reasonableness of the rule so filed with the regulatory commission could not be questioned in such a collateral proceeding, but could be attacked only in the manner prescribed by the statute in a direct proceeding to review the orders of the commission. The cases from all jurisdictions had so held without any exceptions known to the appellant—and Arkansas had neither then, nor yet, ruled upon the question.

In argument in the Supreme Court of Arkansas, the plaintiffs again renounced any attack on the reasonableness of the rule, and they have acknowledged this position with welcomed frankness in their motion to dismiss, filed in this court, where they say on page 4:

> "• • • the rule was not being, and has never been, attacked by appellee."

But in spite of the fact that the issue of reasonableness

of the rule was not tendered by the parties, and in spite of the fact that no evidence was offered to prove the rule unreasonable, the Supreme Court of Arkansas seized upon the absent issue in the following words from its opinion:

> "Ordinarily we would feel ourselves bound by such limitations as the plaintiffs themselves may have felt impelled to recognize in the decision of any rights they may have asserted in any matter wherein those rights were purely personal or individual.
>
> "In this matter, however, there are more than individual rights involved. The telephone company is a public service utility, having a monopoly of the service it renders in Fayetteville, where these suits originated, and whatever rules it may announce must be considered not as an all-controlling force, or to possess the nature of a statutory enactment, but as regulatory, merely, of the business of the corporation, and that such regulation must be considered as coupled inseparably, always, with the public interests. Therefore, if rules are not reasonable they may not be regarded as enforcible or as affecting the rights of those who deal with the telephone company."

And the Supreme Court of Arkansas thereupon, without any issue, without any evidence, and in that collateral fashion, declared the rule to be unreasonable, and for that reason affirmed the judgments in favor of the plaintiffs, who were obliged by the statute to comply only with the reasonable rules and not with the unreasonable.

Now the appellant apprehends that scarcely any action of an appellate court could be held to be more unanticipated than this performance of the Arkansas court. The element of undeniable surprise casts these cases squarely within the exception to the rule relative to tardy presentation observed in the quotation from the Herndon case and in the other cases cited in that quotation.

The action of the Arkansas court in deciding the ques-

tion of reasonableness of the rule without notice or hearing on the issue, and without any evidence, is indeed one of the very actions which would deprive the appellant of due process. Obviously, the question of this denial of due process could not be raised before the action of the Court took place—and it was immediately raised at the first opportunity thereafter, on the petition for rehearing.

This Court has repeatedly held that the denial of rights given by the Fourteenth Amendment need not be by legislation (Great Northern R. Co. v. Sunburst Oil Co., 287 U. S. 358; Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278; Abbot v. Tacoma Bank of Commerce, 175 U. S. 409; and the cases hereafter cited). Following that principle, this Court has repeatedly held that, in the judicial procedure, an absence of notice or hearing, or an absence of evidence, on a decided issue, produces an unconstitutional want of due process (American Land Co. v. Zeiss, 219 U. S. 47; Twining v. New Jersey, 211 U. S. 78; Carlson v. Washington, 234 U. S. 103, 223 U. S. 573; Cedar Rapids Gas Light Co. v. Cedar Rapids, 227 U. S. 601; Fiske v. Kansas, 274 U. S. 380).

It is true, of course, that in most of these cases (the Great Northern and Saunders cases being notable exceptions) the federal question of want of due process was raised before a petition for rehearing in the state courts of last resort; but that was because the denial of due process by decision without hearing or evidence occurred in the trial courts rather than in the appellate courts. Such was not the case here; the rule was not adjudged unreasonable until it was so adjudged for the first time by the Supreme Court of Arkansas on appeal.

While the authorities seem to be ample, even if this question of jurisdiction in these cases were to be considered as one of first impression, it would seem that by analogy the rule must inevitably be here established that since a

decision in the *nisi prius* courts may not constitutionally be reached without hearing or without evidence, neither may such a result come to pass in the appellate courts. If the action is taken in the trial forum, and the federal question is there promptly raised after the action is taken, this Court has consistently assumed jurisdiction to review. The implication of the orders of dismissal in these cases would seem to be that this Court will not likewise review such a decision when it is originally pronounced in the court of last resort, rather than in the trial court, although question of constitutionality was thereafter raised at the first possible opportunity.

Certainly this Court does not purpose to prescribe rules affecting its jurisdiction which would permit it to review an asserted taking of a litigant's property without due process of law by a decision of a trial court, but which would prevent such a review if the same oppressive decision originated in the appellate court. Such a hiatus in the protection of constitutional rights cannot be permitted, as this Court itself declared in Saunders v. Shaw, 244 U. S. 317, when it said:

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course, ordinarily that would not be enough. **But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here.** The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling

> or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation. Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312. It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done."

The appellant is not unmindful that the claim has been made that the confused opinion of the Supreme Court of Arkansas lays the decision on some ground other than the unreasonableness of the appellant's rule. This interpretation of the opinion, however, simply cannot be maintained. The decision was clearly based on the unreasonableness of the rule, as the appellant believes it incontrovertibly demonstrated in its brief in support of jurisdiction at page 19 et seq.

In the event, however, that some other ground of decision might conceivably be apprehended, the same principles discussed above would still apply, although in a slightly different connection. If there is, in the decision, a basis different from the unreasonableness of the rule, that basis necessarily involves an interpretation of the penalty statute which the appellant says renders it repugnant to the Federal Constitution. All other grounds of decision, beside unreasonableness, inevitably involve an interpretation of the penalty statute to the effect that the penalty statute will be violated, under the circumstances of these cases, by a compliance with the regulatory statute. This subject is discussed at some length in the appellant's brief on jurisdiction at page 14 et seq. and page 25.

Since this federal question under the Constitution could not have arisen until the penalty statute was so interpreted as to make obedience to one statute a violation of another,

the appellant cannot perceive how that federal question could have been raised in advance of the unanticipated interpretation which for the first time effected the unconstitutionality of the statute. Until the Supreme Court of Arkansas interpreted the statute in such a way as to render it unconstitutional, the appellant knows of no process by which it could have ascribed unconstitutionality to it.

Indeed it did argue that if the statute were not construed as appellant had construed it, the unconstitutional result would follow. The appellant knows of nothing more that it could have done. In its argument to persuade the Arkansas Court to adopt the appellant's interpretation of the penalty statute, it was pointed out that any other interpretation would end in unconstitutionality. This argument was used in connection with the familiar rule that if multiple interpretations are open, the one that accords with constitutionality ought to be adopted. Until the Arkansas Supreme Court's decision, the federal implications could not have been raised in the record, but could only have been raised, as the appellant did raise them, in the argument for an interpretation of the statute which would not conflict with the Constitution. Until the Arkansas Supreme Court so interpreted the statute as to attribute unconstitutionality to it, the statute was entirely valid; and the appellant could not have been expected to look upon it otherwise. The statute became unconstitutional only at the moment when the Arkansas court's decision, containing the unconstitutional interpretation, was handed down. And promptly thereafter the appellant raised the federal question in its petition for rehearing. Under these circumstances, to paraphrase this Court in Saunders v. Shaw, "We do not see what more he (the appellant) could have done."

For the reasons here advanced, the appellant urges that the orders of dismissal herein be set aside, that the mat-

ter of this Court's jurisdiction be reconsidered, that probable jurisdiction be noted, and that these causes be set for hearing upon both the merits and the question of jurisdiction.

Respectfully submitted,

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